

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 22, 1999

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REGULATORY AUTHORITY

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EXECUTIVE SECRETARY

IN RE:

**PETITION FOR ARBITRATION BY
ITC^DELTA COM COMMUNICATIONS,
INC. WITH BELL SOUTH
TELECOMMUNICATIONS, INC.,
PURSUANT TO THE
TELECOMMUNICATIONS ACT OF 1996**

DOCKET NO. 99-00430

**ITC^DELTA COM COMMUNICATIONS, INC.'S RESPONSE TO BELL SOUTH
TELECOMMUNICATIONS, INC.'S EXCEPTIONS TO REPORT AND INITIAL
ORDER OF PRE-ARBITRATION OFFICER**

On October 6, 1999, the Pre-Arbitration Officer ("PAO") in the above-captioned proceeding issued a "Report and Initial Order of Pre-Arbitration Officer" in this docket. BellSouth Telecommunications, Inc. ("BellSouth") filed Exceptions to the Report and Initial Order on October 15, 1999. ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") hereby responds to BellSouth's Exceptions.

I. The Tennessee Regulatory Authority Should Affirm the PAO Report and Initial Order Regarding Performance Measures and Guarantees

In his Report and Initial Order, the PAO found that Issues 1(a), 1(b), 2(c)(vi), 2(c)(xiv)(b), 8(b), and 8(f), regarding performance measures and guarantees, "relate specifically to 47 U.S.C. § 251(c), regarding interconnection that is equal in quality on rates, terms and conditions that are reasonable" and therefore are appropriate for arbitration. Report and Initial Order at 10. BellSouth takes exception to this finding, arguing in a conclusory way that these

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issues simply are not arbitrable. BellSouth's contention is untenable. BellSouth is in effect asking the Tennessee Regulatory Authority ("TRA") to decide these issues on the merits in favor of BellSouth without consideration of any evidence, asserting that the TRA has no authority to impose "damages" or "penalties." ITC^DeltaCom directs the TRA to its earlier filed briefs, but for convenience will summarize its position here.

First, the parties have attempted to negotiate this issue but have been unable to reach an agreement. Under the Telecommunications Act of 1996, Section 252(b)(1), the TRA has the authority and duty to hear any open issues upon which the parties have not been able to reach an agreement. Second, ITC^DeltaCom is not requesting that the TRA impose damages if BellSouth commits a material breach of the Interconnection Agreement. Rather, ITC^DeltaCom's Petition for Arbitration proposes various self-effectuating provisions that will provide contractual incentives for BellSouth to perform fully under its contract. It is axiomatic that companies are more likely to perform where there are negative financial consequences for nonperformance. This principle is the foundation of ITC^DeltaCom's proposal. ITC^DeltaCom is not asking the TRA to award damages or to enforce penalties against BellSouth for a specific failure, but simply to arbitrate the issue of whether the self-effectuating performance measures and guarantees proposed in the Petition should be included in the Interconnection Agreement at all. Consistent with the holding of the PAO, the TRA should at least agree to hear evidence on this vital issue.

II. The TRA Should Affirm the PAO Order Regarding Extended Loops

The PAO further found that relative to Issue 2(b)(iii), regarding "nondiscriminatory access to network elements," the "clarification suggested by DeltaCom at the Conference does not unduly expand the issue, and further, it provides the Arbitrators with the necessary specificity

required for an appropriate determination.” Report and Initial Order at 11. BellSouth asserts that this issue was inappropriately expanded in the PAO’s Report and Initial Order. ITC^DeltaCom agrees with the finding of the PAO and points to its Petition for Arbitration filed on June 11, 1999 in support of this position. That Petition included a proposed Interconnection Agreement, attached as Exhibit A, which not only articulated each and every issue that remained open after 160 days of negotiations, but also included proposed contract language, which if adopted would resolve each open issue. Paragraph 6 of the Petition specifically incorporates Exhibit A into the Petition. Paragraph 24 of the Petition clearly and specifically refers to Attachment 2, Section 1.3 of the proposed Interconnection Agreement. Attachment 2, Section 1.3 states that BellSouth shall provide “Extended Loops” and “Any other UNE combination(s) furnished to ITC^DeltaCom as of January 25, 1999.” There can be no dispute that ITC^DeltaCom requested of the TRA on June 11, 1999 that BellSouth be required to provide “extended loops” and any combinations that were furnished to ITC^DeltaCom under the previous interconnection agreement.

In addition, ITC^DeltaCom’s Petition included a summary matrix of issues, attached as Exhibit B. Paragraph 7 of the Petition specifically incorporates Exhibit B into the Petition. This summary matrix of issues clearly refers to the issue of extended loops, providing ITC^DeltaCom’s position that it “should have continued access to those UNEs which it is using to provide service to customers today under the existing [Interconnection Agreement].”

Furthermore, under the previous Interconnection Agreement between ITC^DeltaCom and BellSouth that was approved by the TRA, BellSouth provided “extended loops” to ITC^DeltaCom through a combination of a UNE loop, cross connection, and special access transport service. That interconnection agreement was approved by the TRA as compliant with

Section 252 of the Act. Nothing has changed that would make it no longer compliant, and nothing would make the requirement to provide such extended loops inappropriate for arbitration.

For the foregoing reasons, the TRA should affirm and uphold the Report and Initial Order of the Pre-Arbitration Officer with respect to these issues.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of October, 1999, a true and correct copy of the foregoing was served by hand delivery, facsimile delivery, overnight delivery or U. S. Mail, first class postage prepaid, to the following: Guy Hicks, Esq., BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300



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